MICHIGAN SUPREME COURT

MAY 25, 2000 PUBLIC HEARING

MR. WEBER: Good morning, ladies and gentlemen, members of the Supreme Court. For those of you who don't know, I'm Marquette County Circuit Judge John Weber and this is my courtroom. On behalf of my colleagues (inaudible) in Marquette County, the bar and citizens, I'd like to welcome the Michigan Supreme Court to Marquette County. We are delighted to have the Court come to our historic courthouse in Marquette and conduct part of its business and with that I would like to introduce the Chief Justice of the Michigan Supreme Court, the Honorable Elizabeth Weaver.

JUSTICE WEAVER: Thank you Judge Weber. And we would like to thank everyone in the U.P. and here in Marquette particularly for the warm hospitality that you've shown us. We came in yesterday and had an opportunity to meet with a number of the people in the community and we appreciate the opportunity to be here and to all the judges who have welcomed us into this most beautiful courthouses and courtrooms in our entire state. And we're very pleased to be here and so we say yeah, you betcha. What we have going on this morning is an administrative hearing. Our Court has a number of responsibilities and we have superintending control over all the courts. You may know we have in Michigan we have over 250 courts and 600 judges and Michigan as you know is a very big and diverse state. You notice that I know that we must include the U.P. I myself am from Lenanauw County if a good swimmer can get over here fast. But generally have to fly or drive and I'm what you people up here in the U.P. would call a northern troll. I also want to recognize Judge Roy Gotham here who is a long time friend of mine and we were both probate juvenile judges. I've been a judge now 26 years and served on the probate juvenile trial branch and the Court of Appeals and Supreme Court. What I want to do first is introduce all of my colleagues who I am very proud to serve with each and every one of them and who are very fine qualified people. I will start with our most recent addition to the Court and that would be Justice Steven Markman over here on my left. Next to him is Justice Moira Corrigan. Next to Justice Corrigan is Justice Marilyn Kelly. And next to me is our most senior Justice, Justice Michael Cavanagh. Next to him is Justice Clifford Taylor and finally on our far right is Justice Robert Young. We all, I am speaking for all of us, that we are indeed glad to be here and would like to let you know how we run this administrative hearing. We want to give everyone an opportunity who has come to speak if they wish to do so. We have an agenda which was on our award-winning website. www.supremecourt.state.mi.com and it was also published in the bar journal and in various places so we are coming out, we're very interested in hearing from all the citizens in the state because our goal is that Michigan has very fine courts but we always want them to be better. We want them to be just,

timely, fair and unbiased. So we want the best possible judicial services that we can provide in Michigan. And because it's such a big state, and Kewenauw which has about 1,000 people to Wayne County which has about 2 million people, one size does not fit all. And we're very conscious of that and so we're always trying to make sure that keeping the goal in mind of the best services possible to the public that we know what the needs are in various communities. And by the way, between 1000 people in Kewenauw and 2 million in Wayne, we have them all sizes in between. There are 83 counties in this state and we have almost 10 million people now. With that I would like to explain to you also that in order to give everyone time to speak we allow 3 minutes and there is a little light box up there and when you have one minute left a little yellow light will come on and when your time is up a red light will come on and certainly you can finish your sentences or your thought but in order to give everyone who would like to speak opportunity, we're going to try to stick closely to our times. And anyone who did want to speak who didn't communicate us by our website or by letter, if you have let Mr. Davis know, I don't know where he is now, somewhere, then you let him know. And he's at the back so you can let him know you would like to speak. Now with that we also have Judge Tom Solkis here, where is he. I want to recognize him. Where's the judge? There he is back there. He's your circuit judge, and then of course Mike Andaray, Mike where are you. There you are, I didn't see you. I came down to your office earlier, you know that. He was on the phone working very hard. And then of course Judge Collins, where are you? I had the privilege of seeing him earlier today and yesterday also. We also I believe we're going to see our district judge that is retiring, Judge Nicolette – there she is. And we certainly wish you the very best in your undertaking of a new lifestyle and you have served Marquette and the people of Michigan with great distinction and we appreciate that. I don't think there are any other judges here, right. It's just oversight if I'm not recognizing you. You have a wonderful bench here in Marquette and you can be proud of that. Now with that we're going to start with 98-34. And I would tell you we have things on the agenda and sometimes people have no particular interest in a community to speak about them and we may hear something written so I don't know if we have anyone to speak on those. I'm going to start with Item number 2 now, which is lawyer specialization, and that is 95-20. And I believe we have Numinen to speak.

Item 2 - Lawyer Specialization

MR. NUMINEN: Thank you Chief Justice and Justices. May it please the Court. Thank you for this opportunity to address the Court on this topic. Just by way of introduction, I'm a member of the Family Law Council of the State Bar of Michigan, although I'm not speaking on behalf of the Family Law Council but that's particularly relevant because I went through the process of becoming a certified adoption attorney back in 1994 to start practicing adoption in 1995 and it's in that regard that I am

particularly interested in the State Bar Rule No. 18, this lawyer certification plan. I think that it's a double-edged sword or has the potential to be a double-edged sword. On one had a certification plan has the potential to promote the skill and competence of our profession. It has the potential to raise the degree of professionalism among the bar by continuing legal education requirements in order to obtain the certification. On the other hand, though, I think this certification plan has the potential to exclude lawyers from practicing in certain areas and may signal the demise of the general practice attorney and in the Upper Peninsula in particular, that would be a problem. I think that the proposal to adopt a certification plan is a good one with one caveat and that is that if we do so, that the certification plan not be a separate and additional licensure. In other words, if a person was certified as an adoption attorney, the way the original certification for that program was that no other lawyer could practice adoption without first obtaining a certification and I think if we begin that specialization process we may end up on a slippery slope where everything becomes a certified practice and then we exclude lawyers from practicing in certain areas that a general admission to the bar should allow one to do. So I'm suggesting that it's a good idea to certify lawyers because it has the potential to raise the bar. On the other hand, let's not make it an exclusionary vehicle. Thank you.

JUSTICE WEAVER: Yes, and let me just say this. The Justices may be asking you questions when you're finished and so we do want you to stay for that.

JUSTICE KELLY: Do you believe that we should have mandatory continuing legal education for lawyers if we do not have certification for specialities.

MR. NUMINEN: I do personally. I think the mandatory continuing legal education is a significant means to raise the bar again. To provide for attorney competence. To promote the professionals in the practice. As a somewhat young attorney I remember going through the mandatory continuing legal education courses that were offered at the time thinking that some of them were completely irrelevant to my practice, to my career at the time. But I think that the two, the certification program and the mandatory CLE can operate in conjunction hand in hand with one another.

JUSTICE KELLY: Do you believe that if mandatory continuing legal education were adopted in Michigan, that Upper Peninsula attorneys could be disadvantaged by having difficulty finding courses that they could take that were useful and relevant to them.

MR. NUMINEN: I suppose that's a potential obstacle but with the way–in fact I've been involved in some CLE on behalf of the Family Law Council and I've been a moderator of different CLE courses in Grand Rapids and most of them were done via

video conferencing anyway. Either we had video presentations done with local specialists acting as moderators to do the question and answer period or with today's technology we could actually do video conferencing where you have the specialty practice experts online or on TV. Now on the other hand, the Upper Peninsula has a lot of, a high degree of expertise in the practice here and we can certainly put on our own CLE programs.

JUSTICE WEAVER: Okay. Thank you. Any further questions, Justices? Thank you so much. I would like at this time to recognize, we have some high school students from Marquette Senior High. Are you in the back of the room there, high schoolers? All right, thank you for standing and the teacher is Kathy Alexander. Good. We appreciate you being here. Glad to have you.

Item 1 - MCLE

JUSTICE WEAVER: Now, we do have some people who would like to speak on the issue no. 1, which is 98-34 which is whether to adopt a program of mandatory continuing legal education for lawyers in Michigan which is certainly tied into the issue that Mr. Numinen just talked about which is whether to have certifying of lawyers. So at this point I'm going to recognize Mr. Alfred Butzbaugh, who is the president of the State Bar of Michigan, and welcome to the U.P.

MR. BUTZBAUGH: Thank you very much, Chief Justice Weaver and Justices and thank you for the opportunity to participate in this magnificent courtroom. I do have just one point I would like to raise and that is that you sent us some questions. They are very good questions. We have studied the questions and responded. As a result of the questions you've raised we've concluded it is appropriate to go back to the representative assembly. The assembly established this as bar policy in 1987, 13 years ago, so we will go back to them to see if they want to continue this as bar policy. However, it would be very helpful to us if we had an idea of those aspects of an MCLE program that you feel would be appropriate and so I would simply ask that you set up a mechanism or that we can set up a mechanism where we could have some dialog with members of the Court so that when we go to the assembly we have a program that you might look at favorably.

JUSTICE YOUNG: I'll give you a heads up. Are you interested?

MR. BUTZBAUGH: Sure.

JUSTICE YOUNG: I guess I asked your predecessor what is mandatory continuing legal education–to what problem is that the answer. Is it the bar's position that

substantial numbers of the members of the bar notwithstanding their ethical obligation to remain competent and handle only cases that they are prepared to handle, notwithstanding that obligation are still failing to keep themselves prepared.

MR. BUTZBAUGH: I think there are two issues and the committee may have more and I hope the Court understands that I am (inaudible) on the peripheral. But there are two issues–

JUSTICE YOUNG: I guess that's one of the questions I want to pose because at least to this point the bar has been unable to provide any empirical data that suggests that mandatory continuing legal education makes any difference.

MR. BUTZBAUGH: I have asked about that issue and my understanding is that there is no survey which would supply the information that you've asked so we cannot prove that in that way.

JUSTICE YOUNG: Well in light of that I guess I'm interested in knowing on what basis the bar says making continuing legal education should be mandatory, on what database is it suggesting that lawyers are failing to abide by their ethical obligations and why we would go into such a large and elaborate mandatory continuing legal education program in light of that absence of data that has been proposed.

MR. BUTZBAUGH: I will make certain that we address that question.

JUSTICE KELLY: Do you believe that it's necessary to show that lawyers are failing in their ethical obligation to be educated on a continuing basis in the law in order for mandatory continuing legal education to be appropriate.

MR. BUTZBAUGH: Well my personal view is no. I think that there is an aspect of this that deals with the public confidence in our profession that could justify this as well in addition to being able to prove it empirically.

JUSTICE KELLY: And in your personal view, is appropriate and high quality continuing legal education useful to lawyers.

MR. BUTZBAUGH: It always has been to me.

JUSTICE CORRIGAN: Mr. Butzbaugh, just a brief comment. I've been asking lawyers the question and I have had the opportunity to visit with different groups of lawyers. I've asked them a lot of questions about MCLE and the interchange I get a

constant theme back in the small groups, two points. First of all, the repeated theme is that just going and having to attend these is an attendance requirement is a bit farcical and that there is no testing requirement that people sit and read newspapers, sign in, don't pay attention, that there's an attitude of disrespect in some of these programs. Particularly I've heard from lawyers who are licensed in other states who have the mandatory requirement about their objections there. The other theme that I've heard from lawyers is that a lot of times the programs that they are required to attend are below their skill level and that they are not able to find something that meets their own needs for continuing education by virtue of the fact that sometimes the programs reach below this common denominator. And that's another point I'm interested in. How do we meet that need and shouldn't there be some component of this that would be permitted to totally identify with what their continuing needs are.

MR. BUTZBAUGH: I will address those two issues as well.

JUSTICE WEAVER: Any other questions, Justices? Mr. Butzbaugh, thank you. Now, on the same subject, that is again whether to adopt a program of mandatory continuing legal education for lawyers in Michigan, Mr. Scott Hanson who is an assistant prosecutor here in Marquette County and I've known for a long time in his work in juvenile issues as president. And before he speaks I would like to recognize his boss who I believe is here. I can't see you Gary, there you are. This is Mr. Gary Walker who is a former president of the Prosecutors Association of Michigan and known throughout the state as a very fine prosecutor. And we're glad to welcome you here too. With that, you may proceed, and the Justices will try to give you 3 minutes before they ask you questions. They'll do their best.

MR. HANSON: Thank you. Madam Chief Justice and Justices, welcome to Marquette. As has already been explained, I'm an assistant prosecutor here in Marquette County. I'm also a State Bar of Michigan appointee/representative on the ICLE Executive Committee. The ICLE Executive Committee has already sent a letter from Professor Reed as chair of the committee to the Court outlining the position of the ICLE Executive Committee as to mandatory continuing legal education. Basically we are in favor of that. I personally am also in favor of that. Some of the questions that I've heard in reference to particularly outstate or U.P. practitioners having problems getting to seminars. ICLE is addressing that because through active internet aspects people will be able to buy and have downloaded into their office teaching materials. In other words, they don't have to go attend a seminar. Stuff will be available. From examples in other states that have mandatory CLE, private industry becomes involved. West Group and other areas. They will be providing training materials and availability of sessions again through internet capability that will meet that requirement. There are already several groups in Michigan,

Prosecutors Association. They provide training for personnel, prosecutors, that is quite valuable and needs to be recognized. Basically what my position is in reference to this is based on the fact that there is a public perception that lawyers if we have mandatory CLE, that lawyers recognize the need to improve. That law changes and modifies and that we recognize the need to improve our skills. When private industry as well as ICLE becomes more involved in that training process, bringing the materials to the user via the internet, they can purchase just what they need. They don't have to go to a 8-hour session on cross-examination when all they want is a 90-minute training as to how to cross-examine medical witnesses. They will be able to get what they need. They can get credit for this that will make our profession function a lot better and the materials will be better. Thank you.

JUSTICE YOUNG: Can I ask you a question. Let me ask you the same question I asked President Butzbaugh. What is the problem to which mandatory continuing legal education is the answer.

MR. HANSON: Both internal and external. From an external standpoint, from the public, it's going to give them a higher degree of confidence in this as a profession and practitioners in the field. From the internal aspect, it will create a better product available so that particularly outstate practitioners are going to have the availability of getting those materials to keep their skills up-to-date and useful.

JUSTICE YOUNG: You're saying by making legal education mandatory, we create a demand that private providers will answer.

MR. HANSON: Yes, sir. ICLE will certainly address that and it has been shown in other states, private industry will address that by providing that product in a very usable and accessible fashion.

JUSTICE YOUNG: Are you here on behalf of ICLE to support the general concept of mandatory continuing legal education or the specific proposal that the bar has made.

MR. HANSON: Again, the Executive Committee has addressed that in the letter that they have sent to the Court. I'm here as a member of the Executive Council indicating that the concept is what is necessary. As to the dynamics or the internal, how many credits per year or over the course of three years, I think that's something that needs to be determined.

JUSTICE YOUNG: Well how about the fact that the var wants to be the accreditor of CLE, what do you think about that. That's part of this particular proposal.

MR. HANSON: I understand that. Again, I'm here in reference to the concept, not necessarily the detail of who is going to do that. I think certainly the bar has an interest in creating that. Is it the appropriate both to set up that form of what's accredited and what isn't. That may or may not be the appropriate one. Certainly the Supreme Court can get involved in this through the State Court Administrator's Office and I think there certainly is going to be necessary to have involvement from SBM as to what is and what isn't appropriate.

JUSTICE YOUNG: Why?

MR. HANSON: Because the group that we have in Michigan represents all attorneys and that would be an appropriate forum just like State Bar of Michigan is representative on the ICLE Executive Council along with all five law schools in the state. They represent at large every attorney in this state and I think that's a good representative forum to be part of the group that's going to decide what should and what shouldn't be certified.

JUSTICE YOUNG: So you think somebody should verify that the programs that ICLE produces are worthy of certification for such a continuing legal education program.

MR. HANSON: Yes, and I think because we have five law schools in this state I think we can personnel or a certification committee together that would have the necessary expertise to make sure that we are getting appropriate materials and will be upgraded on a regular basis.

JUSTICE KELLY: Perhaps I misunderstood one of your answers. It's not your testimony is it that we should have mandatory CLE in order to create a demand for these courses.

MR. HANSON: No, we need to have mandatory continuing legal education and because of that we are going to get better product of education. In other words, the materials available to the practitioner, whether in a large firm or a sole practitioner, which most of the attorneys in this state are, they are going to be able to get those materials to keep their skills up to par.

JUSTICE KELLY: If an attorney got the materials over the internet, how would we know that the attorney ever made use of them.

MR. HANSON: Well as in what ICLE is going to be doing, the practitioner is going to be purchasing those training segments and there is going to be verification through that that so and so has purchased this. As to how they involve the skills that they may have learned and for their practice, it's just going to be from a better, higher quality of practitioner.

JUSTICE KELLY: How do we know the attorney will ever read it.

MR. HANSON: Well we have to have some self-regulation in this. We have to have an ethical response within our profession and so from a self-regulation standpoint it would be my position that we have to trust ourselves as attorneys to do what we said we have. In other words, you've taken an oath, they're officers of the court, they should not be in a position where they're going to lie about the fact that I signed up for a course to learn this and didn't do it.

JUSTICE YOUNG: Well then why don't we rely on the ethical character of our attorneys to follow what they are mandated to do by the Canons of Professional Code of Conduct which is to remain current and to accept nothing which they are unable to handle. Why is your argument that we should trust people when we mandate that they go to continuing legal education not applicable to their obligation today to remain current to practice.

MR. HANSON: To remain current under the existing system status quo it is oftentimes particularly for outstate practitioners difficult to get the information that they need to stay current and up-to-date. We are going to have available to us through MCLE a higher quality of product, materials available, for that practitioner to keep his or her skills up to par.

JUSTICE YOUNG: Solely because we're creating the obligation, that's what you're saying. So we're making a market that doesn't exist today.

MR. HANSON: No, the market is there. It's just that there hasn't been a way of fulfilling it or meeting it.

JUSTICE YOUNG: I don't understand that. Can practitioners today in Marquette get CLE materials that they need or not.

MR. HANSON: No.

JUSTICE YOUNG: So how does mandating that they continue CLE create the access.

MR. HANSON: Because that will get the private sector involved in creating the materials that are going to be necessary and available for educational purposes.

JUSTICE MARKMAN: Can I ask you Mr. Hanson. Why doesn't the market work here. I mean the market works in terms of apportioning most of the goods in society. Why in the course of all the lawyer advertising that we see don't we see lawyers tending to say well I want to distinguish myself from my colleagues so I would like to highlight the fact that I've taken, even though it's not required, I've taken various continuing legal education courses and I've attended this class and I've gotten this private certification. Why don't we see that naturally arising in this market. I'm not trying to be confrontational. I just don't understand. Why aren't we seeing that.

MR. HANSON: Well, for instance, ICLE as many of you know for years has had lots of publications. Black on white. Printed books and materials for training and creating skills. Just in the last few years since I've been serving on the committee since 1997 we have watched the demand for hard copy drop tremendously. And at some point why you aren't seeing some of those materials coming out anymore is because the demand isn't great enough and of course, it causes the cost of those, when you go from 1200 people who are buying the Probate Sourcebook down to 800 it makes the cost greater. When you're dealing with particularly the vast majority of sole practitioners, the cost of getting those materials to keep their skills up-to-date and accurate, are becoming prohibitive. If you have to go to seminars, going to and from the seminars can become cost prohibitive.

JUSTICE MARKMAN: I understand it's costly, but I mean it's costly for a contractor to get a certain kind of license. It's costly for a plumber I guess to become a master plumber but nevertheless they do that because they see market incentives to achieve those kinds of characterizations. Again I'm just wondering why don't lawyers see it as being in their interest to advertise that they have achieved or they have attained a level of competence greater in some respect than their colleagues in the profession.

MR. HANSON: Well, some of them do. What I'm referring to is a method of access so they can get the materials they need to keep themselves up to that standard.

And this is a way of accomplishing that. And it's a way that we're going to get, through electronic media, those materials to them on a more cost effective basis.

JUSTICE MARKMAN: But you know there was so much controversy over the last generation about lawyer advertising and it seems to me that advocates of allowing lawyer advertising probably would have said that one of the justifications for that is that we can now differentiate ourselves in a positive sort of way. We're more capable than our competitors or we've achieved some status that our competitors haven't. I mean this is done all the time in most other realms of advertising and I'm still trying to understand what it is that operates in this field that seems to submerge any efforts to differentiate oneself on this basis.

MR. HANSON: Certainly a lot of the advertisements, by looking at the yellow pages locally, most practitioners will say that they have speciality areas of practice.

JUSTICE MARKMAN: Well should we assume they do when they say they do. I mean don't they have an ethical obligation when they say they are an expert in some area of the law, to truly be an expert in that area of the law.

MR. HANSON: Yes, but that's not necessarily the perception of the public. And that's what I mean, they're an internal and external aspect.

JUSTICE TAYLOR: What would your thoughts be on allowing the creation of organizations that would style themselves as let's just say for example, the Michigan College of Matrimonial Lawyers and they would set up certification for people to join that and if you wanted to be in that you could. If you didn't want to, of course you wouldn't have to. And it would be run then at the expense of those individuals who are in the private organization. They would be able to of course utilize that in any way they would wish to and it sort of keys on Justice Markman's question where they would be in that for commercial advantage, one would think. This would then mean that lawyers who don't wish to do that, don't see the commercial advantage in it, wouldn't have to. Wouldn't have to bear the cost of it. But those who did wish to, what's your thought on that.

MR. HANSON: Voluntary organizations, and there would be multiple depending on what speciality area of law you're talking about, I don't think that's the best way to get a firm bottom line acceptable accreditation educational product provided. To have the Court, through the SCAO, along with the input of State Bar as well as the

various law schools, you're going to get a uniform product that's going to be applicable to any practitioner in whatever area. I'm not advocating by any means certification.

JUSTICE TAYLOR: I'm not neither. I mean, this seems to be a serious, but not too serious, proposal because there is no testing. Nor is there any in the United States, from what I understand of these proposals. That seems to me a most unusual way to assure people that somebody got something out of this class.

MR. HANSON: Well, how do you perform an objective test on someone who has taken a test in trial practices.

JUSTICE YOUNG: How does every other profession that requires continuing education, doctors, CPAs, nurses, they all require testing at the end of the course. If you think this is genuinely worth the effort for the PR impact that it has on the public, why aren't you prepared to offer testing like every other profession that requires mandatory continuing legal education.

MR. HANSON: From the research that we've done, and that we've been able to find available from other states that already have MCLE, there has never been an objective standard test instrument available from anything that we've found.

JUSTICE YOUNG: Why does it have to be objective. Why doesn't it just have to be some affirmation that somebody went to a program and had actual cognitive functions during it. I mean what Justice Corrigan has said has been the recurring commentary that all of us have heard, that when you have got to go, like having mandatory therapy, you can make somebody go and sit on that couch, but you can't make them deal with their problems. So you see people reading newspapers and doing other things so if this is really important, why isn't the Bar urging that somebody demonstrate that at least they paid attention. Why does it have to be an objective scientific test. Why can't it be something to indicate that I was paying attention.

MR. HANSON: The fact that someone is buying a product, utilizing a product in and of itself should be enough for that practitioner.

JUSTICE YOUNG: No, you're forcing somebody to go.

MR. HANSON: Well, it's not forced in the way that you can't practice law without doing it. This is to update skills. It's not going to be a requirement of 100 hours in credits per year or even 10 per year. And it's going to be in relevant areas to what your personal practice is. I specialize in children's law, family law and criminal law and do

some appellate work as well. So those are going to be my primary interest areas. I can't go to Grand Rapids all the time to get a product that they're having statewide, whether it's ICLE or some other group. I can't afford to go to Lansing or Detroit all the time. Just travel time from up here or anywhere in the northern lower peninsula mandates two days of driving time and the day at the session. So I've now lost three business days. So okay I work with the county, I can work that one out. But if I can't bill my hours as a private practitioner, that's going to be a significant problem. If I can get what I need, the specified stuff that I need in my speciality areas of practice via internet access and materials provided that way, I'm going to select the ones that are relevant to what I want. I'm not going to go to a session and read the newspaper or whatever just so I can get my name on a sign up sheet.

JUSTICE YOUNG: And you think that unless the Michigan Supreme Court mandates continuing legal education, the marketplace will not provide those products to the practitioners in the Upper Peninsula.

MR. HANSON: At this point in time that has been what has been going on. Many of the private industry ones, and I'm excluding ICLE from here, have withdrawn from that because of the problems that they have in making hard copy products to put out. We've seen just in the last several years Clark Boardman and other, West, other places, that used to provide this no longer doing it and there is no incentive to do it.

JUSTICE TAYLOR: Why has that demand fallen off.

MR. HANSON: Because of the prohibitive costs and the competition from electronic media.

JUSTICE TAYLOR: So they're getting it but just another way, you mean. Is what you're saying is they're getting it but just not in the old-fashioned way.

MR. HANSON: I don't think they are getting it, at least to the degree where they need to have a quality product, a training product, educational product. With a minimum requirement or whatever requirement of MCLE, the demand for the product will go up, the quality of the product will go up and it will be more accessible to the practitioner who needs it.

JUSTICE WEAVER: Could you clarify for me. Your idea is to be able to take it off the internet or CDs or by some sort of thing. But you would not go to a meeting or a conference or a session.

MR. HANSON: Well certainly some of them will be. In fact, as you know, as ICLE often does things, they will set up a seminar training session and videotape it and then have that shipped around the state to other ICLE centers. In fact I can't remember the last time we've ever had a live one in Marquette, if ever, but we can get the tapes. So there will be sessions that can be provided that way. What the (_____?) and what ICLE is gearing a lot of their future design and products to is being able to sell that individual segment that the practitioner wants and pump it to them via the internet.

JUSTICE WEAVER: And he not go to a meeting. He can do it in his office or his home.

MR. HANSON: Exactly. Any time of day or night. I can be up at 3:00 in the morning and as a 24-hour accessibility I can download what I want. A lot of the materials are going to become interactive. Not one-on-one live bodies but it will be an interactive training session where the practitioner will pick choice A or B and then that leads you into something else. And they will get better in active training that way.

JUSTICE CORRIGAN: Doesn't that lead to the notion that you could have a testing requirement in any mandatory CLE then. We got a letter most recently from Daniel John Loomis of Corunna who indicates that he objects to the current proposal because the attendance requirement is a joke. He said when he was an active member I'd go to CLE courses and find people sleeping, reading the paper, doing legal work and some listening. He would suggest that we change the attending requirement in the proposed rule to successful completion, and he points to the example of his wife, an LPN, who must attend continuing education courses but has to have a passing grade to get course credit. Then Mr. Loomis suggests to us that even if the _____? course had a fill-in-the-blank course outline which had to be turned in for credit, that would enhance the possibility of learning taking place. Well if you have interactive videos you can have fill in the blanks and you can have a testing requirement that makes some sense. I mean, I just don't want to do something that's phony. And to say that you just have to show up at a place, that's all that the requirement is, that learning is going to take place, that seems to me if we want to enhance public confidence I don't understand how pure attendance does it under the current proposal. And I don't frankly think that you've answered that part of the question that's been posed.

MR. HANSON: All right, as to the attendance being a factor, consideration, I'm sure that at many training seminars, whether ICLE or otherwise, that people just go as that letter indicates to you. That people have just gone, signed up, slept and all the rest of it. If there is a component or way, a demonstrated instrument that could be used effectively, whether it's creating an outline you turn in or if it's interactive, if

there is something that could be done that way. From again, from the research that we were able to garner from other jurisdictions that have MCLE, there had not been designed an effective instrument to do that. Does that rule it out in the future, no, of course not, and the more interactive that internet access capabilities are and the more practitioners that are involved in it, certainly something could be designed along those lines. And something that's not objective. As we know, there are not always yes or no answers in this. Back in the days when I was a teacher and a therapist, I used to look for one-armed lawyers because every time I went to a lawyer they'd say on the one hand you've got this, on the other hand you've got that. So as long as it's not set up as a strictly objective yes/no, right/wrong type situation, what could be a fill in the blank would show that at least between the two ears had been spinning and working, if there is some way of doing that I don't see that there is going to be a major objection to that.

JUSTICE WEAVER: You also are not saying that ICLE or Institute of Continuing Legal Education, for everyone to know, or the Bar Association or any other group should particularly exclusively do this, is that right.

MR. HANSON: No, of course not.

JUSTICE WEAVER: You see a role for the law schools, if this is something to be done.

MR. HANSON: Oh, yes, particularly in trying to define what is certifiable, acceptable product for this education. And I think there is lots of resources through the five law schools in this state that would provide that in any number of different areas as well as taking practitioners through the fields, just as ICLE does now for the seminars, and use those available. But if we can get a uniform consistent bottom line I think that's what we need to work on. And this is not exclusive ICLE. ICLE is not saying we'll be able to take care of all this for you. This is to create, in a competitive environment, a better work product or better educational product from any number of different providers which will include ICLE as long as that's something that the Bar and law schools can continue to support.

JUSTICE WEAVER: But you still aren't requiring under mandatory that people buy a product. They're not going to buy a Ford, they've got to buy a Chevrolet or they've got to buy something, right.

JUSTICE YOUNG: And so the programs that your own office proposes would or would not qualify. The in-house program that your own prosecutorial office would qualify or not.

MR. HANSON: Yes, via the Prosecutors Association? Yes. They could set their training programs up so that they would meet the certification requirements.

JUSTICE YOUNG: Well how about your in-house. Just your shop that sets up programs to train your assistant prosecutors in the changes in the criminal law that come down, those would not be eligible for credit under a mandatory CLE.

MR. HANSON: I think anyone or any group that is providing training via seminar or hard copy materials or any kind of interactive electronic media certainly can apply to have their product evaluated for certification. It doesn't matter where it comes from, it just demands what the quality of that product is in meeting the need of the practitioner in Michigan.

JUSTICE YOUNG: And you think someone better than the leaders of your prosecutorial office can determine what's needed for the assistant prosecutors there.

MR. HANSON: In a prosecution sense, we've got the National College of District Attorneys, the NDA, various other groups that provide around the country various training forums. Some states that have mandatory education have certified that program and give credit hours.

JUSTICE YOUNG: I'm talking about your internal shop.

MR. HANSON: Just here in Marquette?

JUSTICE YOUNG: In Marquette. You think there is somebody better than you and the prosecutor who can determine what your assistant prosecutors need in the way of in-house training and that you need to have your program certified before the attorneys that you require to take that training can get credit for it.

MR. HANSON: As such in our office which is relatively small, anything is informal. We don't have regular training sessions. There are various members of our office that have speciality areas, or have areas of expertise that others don't. We go to them, you know if I want to find out about modifications or recent changes in PPOs. We've got two people who have a lot of knowledge in that regard so I can go to them and ask for stuff.

JUSTICE YOUNG: But that would not qualify as legal education.

MR. HANSON: No, that doesn't qualify. Because the materials out there come from so many different sources, some of the information is not even accurate or it's applied differently in various places around the state. We need uniformity so that we've got a quality product that can be provided.

JUSTICE YOUNG: But PPOs given in Marquette might be different than they are in Wayne County, right.

MR. HANSON: No, the PPO is based on statutory law as well as court rule and that should be uniform around the state.

JUSTICE WEAVER: Any further questions? Mr. Hanson, thank you.

MR. HANSON: Thank you. Appreciate your time.

JUSTICE WEAVER: Certainly exceeded 3 minutes, didn't we. We have one more person who has asked to speak on this issue and that would be James Stewart. Mr. Stewart.

MR. STEWART: My name is James Stewart. I'm a practicing attorney. My office is in Ishpeming, Michigan up the road about 14 miles. I have practiced in Marquette County for about 27 years. I probably have more continuing legal education credits per year than anybody else in this county. I attend a ridiculous number of continuing legal education courses probably because a little bit of feeling of inadequacy so I feel I have to go to these to make sure I'm doing it right. But I'm opposed to mandatory continuing legal education. I am very much opposed to it on the basic premise, initially, that it will not make attorneys better that are not already doing this on their own. That do not already feel that they need to go to these seminars, to acquire this information to make them better practicing attorneys and keep themselves up to date. Now there are many ways of doing it, of course. Many attorneys read on their own. They read the legal materials that they subscribe to and keep abreast that way and others simply do it by practicing. That is the best way to become a good lawyer and keep up to date is by practicing what you do and doing it as best as you can. Now the other end of the spectrum, those in our profession that may feel may not be quite competent, that are not maybe doing as good a job as they should be, this proposal is not going to fix that. That's not going to change that because as was pointed out all you have is a measure of counting credits. You're counting how many times they've gone to a seminar and signed up and gotten the credits. And that's not going to change someone who already isn't practicing competently. That's not going to change. Another aspect of the current proposal that is probably necessary if we're going to have this but I find some problem with and that is

that if the lawyer does not complete the required number of credit within the time permitted, then they are placed on involuntary inactive status. Well that doesn't mean they aren't competent to practice law. There's the credits aspect but yet you're saying that because they did not complete those credits they are incompetent, we won't let them practice until they do that. That has no connection to the real life of practicing law. And there are other issues about geography. Here in the U.P. one of the reasons I can do this, that is go to a lot of the courses is because they're held videotape in Marquette. They're not held in Ironwood. They're not held in Sault Ste. Marie, they're not held in Iron Mountain. Those cities are two hours away from Marquette. So those attorneys do not come to these very often because it is a burden to do that and so they have to acquire their information other ways. So I feel that there is a problem for upper Michigan practitioners to be able to get the necessary credits easily.

JUSTICE WEAVER: Mr. Stewart, before the Justices may ask you any questions, two things I want to make clear. One is that because the proposal is out it is not the Court's proposal. The Court, as you can see, has not made up its mind whether it would do this or not and many of these proposals don't even originate with the Court but we feel they're important enough to bring them forward for public comment. So just because we put them out there doesn't mean we're advocating it or not advocating for it. The second thing I want to do is recognize that we have a fourth grade class here from Aspen Ridge School and I think the teacher is Mr. Joe Goeng, is that correct, and we just want to welcome these young people as they are passing through, seeing this beautiful courtroom and getting to see their Supreme Court in action, so we say hi to all of you and our fine county clerk here is taking them around. So with that, now there may be some questions for you and I wanted to take that break because we don't want to have to have those young people standing here all that time.

JUSTICE YOUNG: Counsel, again I'm sort of lost because the proposal has come from the Bar, they have not, other than asserting a public relations value that everybody thinks it's a good idea for lawyers to take and continue to educate themselves, there really isn't a lot of data that suggests that mandating continuing legal education makes any difference. And there isn't any data frankly about how many lawyers are or not in Michigan availing themselves of continuing legal education. Is your sense as an Upper Peninsula lawyer that the lawyers in this community are not availing themselves of continuing legal education.

MR. STEWART: Well that depends on how you define continuing legal education.

JUSTICE YOUNG: Well let's start with that. I posed to Mr. Hanson that the informal communication with experts in his office at least in my view were entirely appropriate, exactly what you want a competent lawyer to do, consult a senior lawyer who is expert in a particular area. He didn't think that that was the kind of educational opportunity that should be credited. How do you feel about that.

MR. STEWART: I don't think you can credit it. I think it's very difficult to quantify that sort of experience and increase in the person's knowledge base. As far as a quantity is concerned and calibrating that and reporting it, I think that's something you can't really do and that goes on all the time.

JUSTICE YOUNG: The question is, is it continuing legal education. You were talking definitionally. I would consider that continuing legal education.

MR. STEWART: Okay, I would agree with you, yes. But I don't know how you would actually credit that in a formal system and that's part of my gripe I would say. In our office the attorneys get their knowledge in different ways and I'm the one that goes to seminars a lot because in my area of practice there's a lot of material that comes out. I do a lot of estate planning, probate and elder law and so there's a lot of material that comes in seminar fashion that I can get because it's in Marquette fairly efficiently. But for other areas of practice it's more efficient for the attorney to read the journals or subscribe to a particular publication and get the information that way. For a trial lawyer the trial practice skills are something that's very difficult to get out of a seminar and I think there is only one a year that really goes into that significantly in Michigan, maybe two. And I guess that's another aspect of my gripe here is that different areas of practice really require different types of upgrading and upkeep so to speak to keep up the skills and for my area as I say there is a lot to do with forms and changes in the law and so forth that you need to keep up on. For a trial lawyer it's a little different. You've got to be able to think on your feet. You've got to be able to make the objections at the right time. But some of those don't change very fast and those kind of things don't change quickly so once you've got that base you can be the best trial lawyer in Michigan, be trying cases throughout the year and not have time to go to seminars and not be able to satisfy the requirements even though you're one of the best trial lawyers in the state of Michigan. I think that's a definite fallacy of the idea of continuing legal education is it does not address and cannot address all areas of practice and the kinds of things that lawyers do on a day-to-day basis. It is just not possible to do that.

JUSTICE YOUNG: What I'm asking you to address though, is there a need for mandatory continuing legal education. I know you don't like it but is there a need and it's been asserted that there is a public relations need because everybody in the

public thinks that this is the kind of thing lawyers should be imposing on themselves, I'm asking you if you think that is a legitimate reason for this Court mandating it or do you see in your daily practice that you come into contact with lawyers who really are not competent, who are not by all the various means that lawyers can have at their avail to increase their store of knowledge to remain and continue to be competent, are you seeing a lot of incompetence in your practice.

MR. STEWART: I feel that there are lawyers that I come in contact with that are less competent. I'm not sure I would go so far as to say incompetent except if I happen to be angry with one but assuming there are some that are less competent than others and I don't know how you can change that. My belief is that mandatory continuing legal education is not going to change that. I happen to be a licensed pharmacist in the State of Michigan. We do have mandatory professional education continuing for pharmacy. My daughter happens to be a veterinarian. They do not have that requirement for veterinarians in the state of Michigan. And yet those two professions manage to go on and pharmacists have had a very high rate of respect from the public for years and years before the mandatory professional education requirement went into effect. That was true before that. So I submit that as far as the public perception is concerned, the mandatory professional education is not the crux of it, is not the reasons–the problem with lawyers, one of the problems anyway with lawyer perception is not that they're incompetent as a group. You'll get occasional problems of course that will come out in the public will be publicized but as a group I don't believe that that's the premise or perception that the public has. I don't think that is really where the problem lies and that's not a reason in other words. I do not believe that would be a reason for mandatory continuing legal education in Michigan.

JUSTICE MARKMAN: Well Mr. Stewart, I mean if there are indeed attorneys who you tactfully call less competent than others, how would you respond to the argument that mandatory CLE is better than nothing in protecting the public. Maybe some will take it seriously. Maybe some will go to sleep but maybe some will take it seriously. Don't these benefits outweigh the harm and what are the alternatives for dealing with the less competent attorneys.

MR. STEWART: I do not have the answer for alternatives. As far as addressing this proposal, I do not believe this is going to have any effect on that because those who are incompetent are not going to become competent because they are required to attend some seminars. The seminars that they would attend wouldn't even have to be those that pertain to their area of practice. It might just happen to be those that are convenient.

JUSTICE MARKMAN: Why are you assuming that the quality of the CLE has to be such that it can't bring somebody up from incompetence to competence. What if you had a truly good CLE program. Isn't there at least the potential or the possibility that it could bring somebody up to a level of competence.

MR. STEWART: Okay, right, if you assume that the person is going to go to the CLE program because they already feel that they need to bring up their level of competence and therefore will participate actively in doing so.

JUSTICE MARKMAN: No, I'm assuming that they're compelled and it's only because they're compelled they're going. But nevertheless at least some people who are compelled to be in a classroom may be prompted by virtue of that experience to gain some knowledge that they wouldn't have otherwise had.

MR. STEWART: I doubt very much that it will have any noticeable effect but if it did it would be on a very small number basis and the proposal is to make mandatory continuing legal education across the state for absolutely everybody at considerable cost to the practitioners, by the way. This isn't going to be free. And to say that we might be able to affect one or two percent, and of course this is just taking some numbers at random, but whose competency level would be increased because of that I think it's using the wrong method to address those practitioners that we think might be incompetent.

JUSTICE MARKMAN: So you're saying that even if there are some potential benefits you think they are significantly outweighed by the various costs that you've described.

MR. STEWART: Absolutely. Because the 99% of lawyers that are practicing, using a rough number, are competent to practice law and–

JUSTICE MARKMAN: Or else they're not competent and won't be made competent by these programs.

MR. STEWART: That's right, exactly.

JUSTICE CORRIGAN: Mr. Stewart, can I ask one quick question. I listened to your remarks. Some of the various programs in the other states the Court has been looking at, I wonder what your reaction would be to this one, sort of a carrot and stick approach. Not the stick but the arrow. In Alaska they've adopted a program of voluntary continuing legal education where they give a dues rebate if you participate. Do

you think that sort of a program would have a good impact on human behavior in our state, that is lawyer behavior, push the ball down the field a little bit in terms of enhancing overall education and getting voluntary behavior to do that. I'm wondering what your reaction is to that.

MR. STEWART: It's appealing initially except that you have the same problem as far as the participants are concerned. The participants who are going to go to these because they want to enhance their skills or because they feel they need to update themselves on a particular practice are are going to go and they'll be encouraged to go, of course, under that proposal. Those who really don't care about the system, don't care about enhancing their skills that way will go because they can get a rebate and you're not going to have any different result overall except you will have the whole layer of additional bureaucracy that you have to put into place to be able to set up the standards, to police it, to make sure that it's done properly. And at additional expense to the State Bar and the practitioners.

JUSTICE WEAVER: Mr. Stewart, is it perhaps fair to characterize what you're saying is that you and every lawyer that is allowed to practice law in Michigan has taken the oath to be competent and not to take cases that they're not qualified to handle, is that correct.

MR. STEWART: That's correct.

JUSTICE WEAVER: And in a sense that is a mandate isn't it.

MR. STEWART: Oh, yes, absolutely.

JUSTICE WEAVER: So we probably already have mandated continuing education for lawyers but what we have in front of us is a new definition of it, is that correct, and you are objecting to the new definition.

MR. STEWART: That is correct. And one of the reasons as I said at the outset for that objection is that this will not address the ultimate competency issue and responsibility of the lawyers to maintain their competence, just as a paper method of keeping track of the fact that we're saying okay all the lawyers have to take 30 hours in 2 or 3 years and so we have a system in place to make sure you do that. That doesn't insure the fact that they've already taken the oath that they're supposed to be maintaining their competency anyway.

JUSTICE WEAVER: And are you trying to say that in your opinion certainly the lawyers you deal with, I think I heard you say 99% or some percentage you think are basically competent. Some may be more competent than others. And I take it that you feel that one percent that would be truly incompetent should be disciplined or removed in some way improved.

MR. STEWART: That's actually true.

JUSTICE WEAVER: Is that what you're thinking.

MR. STEWART: Yes, I do.

JUSTICE WEAVER: So you're not against mandatory continuing education. You see that you already have it by your oath to the bar, is that correct, and you are doing it. But you are against trying to quantify it by having to take so many hours and report. Is that where you are. Because you obviously keep yourself up to date.

MR. STEWART: That's true, I'm opposed to the new system of, layer, basically, that will be imposed on the bar, on the practicing attorneys relative to this what's called continuing legal education. I'm opposed to that formalizing of the process. We've had continuing legal education in Michigan for as long as I've been around practicing law. It's there and it's actually the delivery of that system has improved greatly in my opinion over the past 10 years or 15 by the advancements done in large part by the Institute, by videotaping, by making those videotapes available to people and also now some internet services. So we continue to see advancements in delivery which makes it easier for practitioners to participate and get that information, but to formalize that and put a layer of bureaucracy over this whole thing I feel is a mistake. I feel it imposes an extra expense for which there is no corresponding benefit. And it actually could end up interfering with the advancement of the delivery in the future because the system isn't going to be able to respond as quickly as advances in technology do. So I just really, in my opinion, especially with regard to the legal profession, although I question whether it really does a very good job relative to some of the others either. Especially with regard to the legal profession I don't feel that that's going to be a worthwhile project to achieve what the stated goals seem to be just doesn't do it in my opinion. There was some mention about testing, doing a little more elaborate testing for the participants to show that they've really gotten something out of a particular course or seminar. And I would actually be opposed to that because seminars that I go to, one of the reasons I go to them is because they cover an enormous amount of material as a rule. They try to cover either one area very much in depth or a broad number of areas as quickly as possible. We have materials to refer to so some of the information and materials wouldn't even be covered at

the seminar. You have to refer to them when you get back to the office and then use that information in your practice as you're going to law. You don't absorb into your practice instantly when you get back to the office. It doesn't work that way in practice. You have to bring it in a little bit as you go along and that's how I see with regard to any such program of continuing legal education that it takes time to actually assimilate that into practice and to try to test for that in my opinion would first be impossible to do correctly, and second a mistake because then you'd have to narrow your program to a smaller area. I think a seminar would actually be worth less to me then because you wouldn't be able to cover as broad a depth of material because part of the time would be taken up in trying to figure out what do with the testing.

JUSTICE WEAVER: And seminars are only one way that you're keeping up, there are lots of ways that a lawyer continues to grow.

MR. STEWART: Oh, absolutely.

JUSTICE WEAVER: Well thank you very much. Are there any other questions? Thank you Mr. Stewart.

Item 3 - Court Officers

JUSTICE WEAVER: Okay, we are going to move on to Item 3 which is whether to adopt rules regulating the practice of court officers with regard to how writs are executed. Now some of the issues that we bring forward don't attract a lot of public comment and others do. You should know that this is not the only public hearing that we have had or will have in the state and we have had them in Grand Rapids, we've had them over in Benton Harbor. We've had them in Flint, we're now up here in Marquette and we'll be continuing to move around the state. I have no one listed for this particular item and so I will move forward unless I have somebody there that wishes to comment. Why don't you come forward then, I see a hand raised. And would you please identify yourself.

MR. HOLLY: Good morning Chief Justice Weaver, Justices. My name is Rod Holly. I'm with (inaudible) District Court. I'm a court officer. This is Terrence Couch. He's also a court officer. And our concerns in regards to the proposed new rule, paragraphs B and C for starters. Just a brief synopsis of how we got these jobs started. Almost two years ago then Chief Justice Mallett along with Ann Hogan (?) were able to implement an executive order that would bring in new court officers into 36th District Court because of the fact that 95% of the bailiffs retired at one time and they needed the manpower so they did implement that and what has happened since then is as a matter of fact January of this year the MERC, which is the Michigan Employment Relations

Commission made a decision to bring us in as opposed to independent contractors as employees of the 36th District Court and that has happened since. Okay. Now our concern is with regards to the fact that paragraph C, the qualifications of the court officers the appointment shall not exceed two years. Well the thing is now we are employees I don't think that would be concerning to us because of the fact that 36th District Court, being the largest district court in the state of Michigan, they have the most volume in regards to the workload. Every other district court seems to have court officers that work part time. They do other jobs. In our court we are full time court officers. So with regards to that I don't see that that would pertain to our positions on that issue there, paragraph C. And with regards to paragraph B that's basically the same thing. We started off as independent contractors. They have now made us employees of the court under the MERC decision that was filed this year.

JUSTICE WEAVER: Thank you Mr. Holly. Any questions of Mr. Holly.

MR. COUCH: My name is Terrence Couch, 36th District Court officer. I would like to speak on Rule 3106(B), obtain court approval of employees and contractors who assist the court officers in seizures of the property and evictions. The court officers and bailiffs that do this job, 72% of our jobs, houses that we go to evict. We go to the most run down and nastiest properties in the city of Detroit as I'm sure most of you are aware. And for us to have to continuously obtain approval from the courts of who we hire, we can't get regular individuals to come in and work for us. We have to pick up gentlemen from the like NSO and the YMCA because there is nobody else that wants to do that job and the dirtiness that they incur in doing the job, we pick up a different crew every week. And that would slow us down and interfere with our income on a regular basis if we have to continuously request the courts as to who we want to hire and who we're going to bring in to remove this property from these peoples' residence when we go to do the evictions. As to number 5, the court may limit the writs of executions and orders of evictions to the court officers. For the 36th District Court, all of our writs and executions are done on a rotational basis so I would ask if there is some way that there could be unless otherwise specified by that jurisdiction because we can't have them limited because we're on a rotation basis. If they limit it that means they can give one officer more work than they can give another officer and that takes away from equatability. As to (E), procedures regarding issuance of the services, basically the same thing. It's just an open paragraph and they can change that rotation device and take away from the equatability. As to number (3), a court in its discretion may limit the hours in which the property may be seized, that has to do with execution of property on the writ. That takes away from the art of surprise. We have to seize cars, we have to seize property, businesses and things of that nature and if they tell us that we can only get a car from 8:00 in the morning until 10:00 at night, most people that are working nowadays are working 2

or 3 jobs and if we can't get that car until 12:00 or 1:00 in the morning, that's taking away from equatability. The whole sheet seems to be taking away the equatability of the court officer. That they're going to say what time we can do it and what time we can't do it, we don't have a job to go out and work for. Number 2, a copy of the writ shall be served on the defendant, the defendant's agents or posted at the premises in a conspicuous place. There is an order that is called a 72-hour notice in which we mail to each defendant presently before going out to let them know that we are giving them 72 hours to contact us to let us know how to handle this writ of execution before we do it and to go out and just post it on the door, the people may no longer live there or anything. And after we give the 72-hour notice we do go out but they believe that we should give them the 72-hour notice so if they can try to handle it on their own that cuts some of the fees down on them. Page 4, 5B, executed later than 56 days, an order of execution, it should be 91 days. We have 91 days to do orders of execution. We have 56 days, which is (A), to do the order of eviction. And that's about all that I have at this time.

JUSTICE WEAVER: Any questions, Justices? Thank you for coming. We appreciate that.

Item 4 - Permanent Disbarment

JUSTICE WEAVER: We'll now turn to Item 4, which is whether to provide for permanent disbarment of attorneys. I don't know that we've attracted any comment on that today.

Item 5 - Code Judicial Conduct Canon 7

JUSTICE WEAVER: No. 5, which is whether to prohibit appointment of attorneys by judges for a two-year period after the date the lawyer made political contribution. Judge Collins is present and he has asked to speak.

JUDGE COLLINS: Thank you Chief Justice and Members of the Supreme Court. I'm here on behalf, as well as local judges but on behalf of the Michigan District Judges Association of which I am privileged to be the president this year. First I would like to point out how we handle court appointments here in Marquette. We have two lists. Lawyers that are interested in being on that appointment list submit their names. We have one list for misdemeanors and one for felonies. The reason for two lists is so that they get an equal proportion of the appointments of felonies in relation to the other lawyers and the same with misdemeanors. We take the next person on the list. If somebody comes before me and I have to appoint an attorney, if it's a felony I make a recommendation of the next person off the felony list. That goes to the circuit judge who generally will affirm

that appointment. If it's a misdemeanor I make the appointment or Judge Mepa makes the appointment. So there is no reward or punishment for contributing to our campaign funds or not contributing to them. I recognize that there is a problem in some areas of the state where judges have been a little unfair in trying to lean on lawyers to make contributions. Some of the problems that you've got in the state of course wouldn't be touched with this anyway because we have the problem in Warren which is entirely different than the reward and punishment thing. So those could be gotten around. If I were a lawyer wanting to be on an appointment list and I wanted to impress that particular judge that I was supporting him and I can't contribute anything to him, there is nothing that says I can't go out and get some of my friends to make contributions and let that judge know I raised some money for him, so you really can get around that I think quite easily. I think that you ought to consider, rather than this kind of a rule which prohibits a lawyer from contributing for that period of time, perhaps as we've tried to deal with the subject of court reform, kind of deal with judicial councils. Why don't you consider the possibility of having the local judicial council come up with a plan that kind of assures some fairness in passing out appointments and then maybe you could have that subject to review by the Court Administrator's office. Some sort of guideline that would see that there was fairness without just saying lawyers can't contribute or they can't be appointed if they did contribute. And that's essentially what I have to say.

JUSTICE WEAVER: Thank you, Judge. Any questions, Justices?

JUSTICE KELLY: How you would propose, Judge, that we might insure there was fairness.

JUDGE COLLINS: Well, like I said what we do here in Marquette, we have a list and we take the next person on the list. It's quite fair because there is nobody getting any partial treatment. Sometimes a defendant will come in front of me and say attorney so and so said that he would take the case if you appointed him, but if attorney so and so isn't the next one on the list, attorney so and so doesn't get the appointment. If that particular person, and this often happens, has other cases pending, we will appoint the same attorney for the new case that he has on the other cases so that one attorney can better cut deals or negotiate settlement for all the cases, better than having several. But it's just taken on a rotation basis.

JUSTICE KELLY: Are you speaking on behalf of the District Judges Association as well as on your own behalf and from your own experience.

JUDGE COLLINS: Yes.

JUSTICE KELLY: Can you tell me whether there was significant difference of opinion among the judges in the Association on this question.

JUDGE COLLINS: No, those that addressed the issue were pretty much opposed to the rule. A lot of them are concerned about raising money for campaigns and I have been fortunate, I have not been opposed in the last two campaigns that I've been involved in so I haven't had to deal with the issue–

JUSTICE CAVANAGH: And you won't have to worry about another one.

JUDGE COLLINS: No, I'm out. The Constitution throws me out at the end of this one.

JUSTICE TAYLOR: Are the district judges in favor of a random selection such as you have here, is that what you're saying.

JUDGE COLLINS: I'm saying that's my proposal.

JUSTICE TAYLOR: No, is that the District Judges' proposal.

JUDGE COLLINS: No, the district judges just merely stated opposition.

JUSTICE YOUNG: Well do they acknowledge in those courts that do not have a list from which the next attorney is selected, that there is a problem perhaps.

JUDGE COLLINS: I think there is in some courts and I think we all have acknowledged that. We are aware of some of the problems that have been brought to the Supreme Court where lawyers have complained about having to make contributions or they don't get appointed.

JUSTICE TAYLOR: So what's the answer.

JUDGE COLLINS: What is the answer. We agree that is a problem.

JUSTICE YOUNG: What's the answer then. If there is a perception that a judge who gets a contribution and who turns around and then appoints that lawyer at taxpayer expense to represent an indigent or to, in the probate side of things, to do an estate, if there is an awareness in the District Judges Association that that might be a problem, an ethical issue, what are they proposing then.

JUDGE COLLINS: Let me say this. I think it's an ethical issue where that judge may exclude those who didn't contribute and require those that want to be on the list to make contributions. I don't think there is an ethical problem if there is a contribution from a lawyer to a judge and the judge appoints him.

JUSTICE YOUNG: No, this is at least an appearance concern, is it not. Where there is the direct appointment by a judge and where there has been a prior contribution by an attorney.

JUDGE COLLINS: I don't think that should be a problem unless that becomes a condition of the appointment. If the judge is saying I'm not going to appoint you unless you contribute to my campaign, that's bad. If he says well you contributed to my campaign, therefore I'll appoint you, that's not good. But if he's appointed because he's a good lawyer and it's coincidental that he received a contribution, I don't think that's bad.

JUSTICE TAYLOR: Judge, what if he doesn't say that but that's what happens. That you have to contribute to get appointments. And you earlier indicated that your Association recognizes that there may be a problem here. So it seems to me that it's incumbent on that group to say well here is what we'd do. You can't just say well let's just let it continue.

JUDGE COLLINS: Well, as I stated here, and my suggestion –

JUSTICE TAYLOR: I understand your suggestion. You want to have it be random. But I wonder, does your Association back that.

JUDGE COLLINS: I'm sure it would. I mean we haven't specifically addressed it, and I will address it.

JUSTICE YOUNG: I would be very happy to hear from the District Judges Association on a solution to a problem that they believe exists, particularly in light of the fact that they don't like the particular proposal that is before us. And I find this as a recurring theme with the bar and judge associations that they say we don't like this, there's a problem. But they don't offer any alternatives. I think your proposal might be a particularly wonderful alternative to the proposal we have before us, but it's only your opinion. You're not speaking now as president of the District Judges Association that this is the alternative solution that obviates the ethical dilemma that the proposed rule is attempting to address. Do you understand what I'm suggesting. It would be very helpful

to the Court, in addition to saying no this isn't the right solution, to actually have somebody coming forth with an alternative.

JUSTICE TAYLOR: Do you think there would be any interest in the District Judges Association coming forward with a proposal that would be a solution to the problem.

JUDGE COLLINS: I think there would be no problem at all with that. What is the deadline on that?

JUSTICE TAYLOR: I don't think there's a deadline.

JUDGE COLLINS: 60 days or something.

JUSTICE WEAVER: Certainly we can hold it for 60 days.

JUDGE COLLINS: Well, our next meeting is on the 19th, or the third Friday in June. I will see that something is forthcoming.

JUSTICE YOUNG: We would be happy to hear what the district judges would think the appropriate solution would be.

JUSTICE CORRIGAN: Judge Collins, could I just suggest as well, there is a pending proposal that is about to come in front of us from the Michigan Judge Association regarding the question of appellate appointments and they have suggested something similar to what you have just stated as an effectively a judicial (inaudible) sort of an idea, so you might want to take a look at the MJA recommendation.

JUDGE COLLINS: I might also point out, the amount of money we pay these guys for court appointments is practically pro bono work anyway.

JUSTICE KELLY: Judge, I would appreciate it when you take this back to your Association that you phrase it in such a way that they realize that we're asking whether any amendment is needed at all and if so, what that would be.

JUSTICE WEAVER: Anything further, Justices? Judge Collins, thank you. Now I have Scott Hanson who would like to address this matter.

MR. HANSON: I will be brief. I echo what Judge Collins said, that the way to take care of any appearance of impropriety is to limit the amount. The language

now possibly leaves a loophole at the $100 so that there may be a possibility of an attorney providing more than that. I certainly think from my practicing here, in Ingham County and elsewhere in Michigan, that setting up a system such as Judge Collins suggested is going to take care of it. By limiting any attorney from an appointment list that has provided contributions, you're treating retained counsel from appointed counsel in a different fashion. I think there are better ways for the justice system to police itself in this regard and simpler ones as well.

JUSTICE TAYLOR: What is the better system.

MR. HANSON: The better system would be to have again a uniform system of appointment that is set up by an attorney wanting to get on that, going through the court, the court interviewing, the court office or judge interviewing to make sure qualifications are present, which is why here we have misdemeanor versus felony to assure quality of legal representation. Now you're going to be functioning, working in front of that judge, so it should be up to that court to determine who is an acceptable practitioner and then beyond the appointment list on the rotation basis as suggested. Certainly there could be modifications and that for extremely involved capital cases or appointments of even multiple attorneys.

JUSTICE TAYLOR: So you think the answer would be something akin to the Judge's proposal that you would have a totally random draw of people that are on that list.

MR. HANSON: Yes, and if there was an objection by a respondent or defendant to something, the court has the availability of changing who that appointed counsel is.

JUSTICE KELLY: Do you think we should mandate what change should be made in the current system or should we request or mandate that each district, each court, initiate within itself a procedure acceptable to it to insure dispassionate appointment.

MR. HANSON: (inaudible) of course, that's in your bailiwick. That's something that you certainly can do.

JUSTICE KELLY: Right. I'm asking what you'd do if you were sitting here.

MR. HANSON: I suppose initially I would like to find out. I don't practice in Detroit. I don't know all the problems that are (inaudible) in that area. Or Grand Rapids or Flint or whatever. I think getting some feedback from the actual practitioners, judges and attorneys in those locales as to what they perceive the problems as and how they think it could be addressed. Certainly, and the bottom line would be that this Court establish via court rule how that would be set up. And I think the dispassionate rotational system of appointment is going to be the answer there and you can take care of political contributions and any issues in that by dealing with the amount of a contribution and cleaning up or tightening up that so the language is clear.

JUSTICE WEAVER: Any other questions?

MR. HANSON: Thank you for your time.

Item 6 - Family Court Rules

JUSTICE WEAVER: Okay, we now will proceed with whether to adopt certain rule changes which would be applicable to the operation of the family court division of the circuit court. And Mr. John Ferrier who is a friend of the court referee is present.

MR. FERRIER: Good afternoon. It's a pleasure to be here and have an opportunity to address all of you. I've submitted written comments on April 3 concerning the proposed rules and I'd like to tell you I bring you greetings of the Referee Association of Michigan which is meeting today for its annual conference down in Traverse City. I'm not going to repeat everything that I said in my comments but just highlight some of the points because I assume you've had an opportunity to review them. We believe, in the Referees' Association, and I personally believe, that having a review of the record produced before the referee is a step in the correct direction and that rule that would provide for this, as does the proposals to change MCR 3.215 would be helpful in the sense that it would bring uniform practice to the state of Michigan throughout the circuits. There is currently quite a divergence in practice on this particular issue. Another benefit of having a record review is that it brings due gravity and lends due gravity to the proceeding, preventing from the referee proceeding via uses of practice run for having the de novo hearing before the circuit court used as essentially a second bite of the apple by a person dissatisfied with the result at the referee proceeding. A record keeps the parties and counsel honest. It gives the court on review an opportunity to see whether the same testimony is being used and it gives the prevailing party the opportunity to challenge inconsistent testimony that's brought up at the de novo hearing. It allows the prevailing party to stand on the record if they so choose and that has the opportunity then to shorten

the de novo hearing and the possibility isn't present (?). It provides for what currently doesn't exist or the out record review of the referee's proceeding immediately before review of the referee's performance by the circuit court. It allows for realistic imposition of sanctions if it is apparent that an objection to a referee's decision is frivolous or interposed for purposes of delay as provided for in the current rule, MCR 3.215(F)(3). A record review also pays due respect to the Legislature's intention that a transcript be prepared and be made available to the court under certain circumstances as enacted in Section 7 of the Friend of the Court Act. We believe that due process is promoted by a review of the referee's record since the court, the parties and counsel will be aware of what evidence was presented, what decisions were made and what the bases for those decisions are. And last but not least perhaps, it allows referees presiding in domestic relations cases the dignity of knowing that the records are not simply tossed away at the whim of a disgruntled party who might not even have appeared at the referee hearing. We've listed some problems that we believe are present with the proposal as written. They have to do with things such as a determination of payment for the costs of the transcript. Making sure that the court be limited, as the current language of the rule puts it, to only allowing the testimony of parties. The problem with that is that we believe that current rules and rules of evidence allow the court, by discretion, to determine how much and the extent of testimony the presentation of witnesses at the hearings and we don't think that a rule saying that at least the testimony of the parties is necessary and then the court may go ahead and allow other testimony. There really is no point of that at this time. We think you've got those rules as they are now and I think my time is up.

JUSTICE WEAVER: Any questions, Justices? Thank you for coming.

Item 7 - Minor Personal Protection Orders

JUSTICE WEAVER: We'll now turn to what the Court is seeking public comment on court rules recently adopted regarding the procedures applicable to minor personal protection orders. Anybody comment on that. Minor PPOs.

Item 8 - LAWPAC

JUSTICE WEAVER: We have also added to the agenda a comment on the proposed LAWPAC issue and on the LAWPAC issue and I have Mr. Peter Ellsworth listed here. Is he here? There he is.

MR. ELLSWORTH: Madam Chief Justice, would it be all right if Mr. Butzbaugh preceded me to discuss the (inaudible).

JUSTICE WEAVER: Okay, and then I have also Mr. John Pirich. Mr. Butzbaugh.

MR. BUTZBAUGH: Justice Weaver, Justices. I had appointed a committee to review the policy of the State Bar. The Committee has printed(?) its work. The committee consisted of five people. Thee were co-chairs. Paul Hilligons and Judge Herald Hood, Nancy Diel was on the committee, Tom Keenbaum and Judge Victoria Roberts. The full committee met three times and several times by conference call. Mr. Pirich addressed the committee orally. He also had certain materials he asked to be presented to the committee which were done. The committee then made its recommendation which was unanimous. That was presented to the Board and the Board adopted it on April 28. That's been presented to the Court. I'll just outline it very briefly. The policy divides the word into two groups. One is affiliated organizations which are essentially the component parts of the bar, and everything else is unaffiliations. For an affiliated organization, that can be on the dues statement at no cost. An unaffiliated organization must meet another test. The principle purpose of the organization must be to affect the interest of the legal profession in general, it must be non-profit and it must be non-commercial. That type of organization then can be on the dues statement upon payment of a commercially reasonable rate and the Board has set that rate for this year at $10,000. There is a second option which is to be what you're referring to as above the line which means the dues that this organization is seeking would be added into the statement and then the lawyer would have to deduct it back out. For that privilege there is an additional fee and this applies to both affiliated and non-affiliated organizations and that would be an additional fee of $10,000 plus 10% of any amount received by that organization over $100,000.

JUSTICE CAVANAGH: To provide for the opt out.

MR. BUTZBAUGH: Yes. That is a policy which the Board has adopted.

JUSTICE WEAVER: That's a reverse checkoff, right.

MR. BUTZBAUGH: Yes, with that additional.

JUSTICE WEAVER: All right, any questions of Mr. Butzbaugh? Thank you. Bring Mr. Ellsworth up.

MR. ELLSWORTH: Madam Chief Justice and Members of the Court, Peter Ellsworth representing the State Bar of Michigan. This is the third time that I've addressed the Court with respect to this issue so I will be brief and address essentially one

issue. The State Chamber of Commerce in a brief that Mr. Pirich filed earlier this month said that the analysis of this issue must begin and end with a review of Section 57 of the Campaign Finance Act. That's the section which prohibits the use of public resources to make contributions or expenditures to political campaigns. The State Chamber's analysis obviously is that by including LAWPAC on the dues statement there is a violation of Section 57 and that essentially is the case that they've presented to you. I think that the position that they have taken is an unreasonable way of reading the Campaign Finance Act which quite frankly would lead to all kinds of other problems in other areas. The important thing it seems to me for this purpose is that Section 57 prohibits contributions and expenditures by using public property. That's the literal language which is utilized in the rule. That's important because the terms "contribution" and "expenditure" are defined terms under the Campaign Finance Act and what the relevant term is that we're talking about here is "contribution" because the allegation is that the State Bar is making an in kind contribution of services to LAWPAC by including LAWPAC on the dues statement. I think it's very clear from the rules of the Department of State that this is not an in kind contribution. And the rule I refer the Court's attention to is Rule 169.34 which in pertinent part states: "A committee which is charged less than the fair market value or fair rental value of an item or service shall report the difference between the amount charged and the fair market value or fair rental value as an in kind contribution." If you sell a service you're not making a contribution. And the analogy here I think is to the prohibition in the Campaign Finance Act against making corporate contributions. Both state and federal law are very clear that corporations cannot make political contributions but corporations obviously do all the time sell goods and services to political committees. If the political committee pays fair market value for the goods or service there is no contribution and that's essentially what we have with respect to LAWPAC. Mr. Butzbaugh mentioned that the policy that was recently adopted by the Board of Commissioners refers to a commercially reasonable value being paid. That terminology was used in that policy simply because it's the terminology that was used in the conciliation agreement which the State Bar entered into with the Department of State. It's a fair market test because that's the test that the Secretary of State is required by the law to impose. Finally I'd like to just mention, oh one other point which Mr. Pirich has addressed. Does this mean that a school board, for example, would be permitted under the law to make contributions to school millages, use school resources to promote a millage campaign. The answer to that is no it does not. Not because Section 57 prohibits that. That kind of activity by a school board has been against the law for many, many years in Michigan and by other public agencies as well and it is interesting that Mr. Pirich attacks too–his latest submission to this Court–a 1993 opinion of the Attorney General that construed the School Code being a bar to that kind of activity by a school board for the reason that it is not expressly authorized by the School Code. Section 57 was passed in 1996 and wasn't in existence when the Attorney General–

JUSTICE YOUNG: But that's only because the School Code doesn't authorize it. It wouldn't be an offense against your reading of the election law.

MR. ELLSWORTH: That's correct.

JUSTICE YOUNG: So could the Secretary of State send out with our driver renewal notices a reverse checkoff for LAWPAC under the same terms.

MR. ELLSWORTH: I don't think it could, Justice. There are other provisions which have been construed in a whole series of Attorney General Opinions as not along that kind of activity by public agencies.

JUSTICE YOUNG: Why.

MR. ELLSWORTH: One provision which has been cited is a provision in the State Ethics Law which precludes the use of public resources except as expressly authorized. And there is no authorization for the Secretary of State to engage in that kind of activity.

JUSTICE YOUNG: What's the authorization of the State Bar.

MR. ELLSWORTH: Action by the Board of Commissioners many years ago, in authorizing LAWPAC to appear on the dues statement.

JUSTICE CORRIGAN: If they're a public body corporate, how are they distinguishable from the Secretary of State.

MR. ELLSWORTH: Well in the first instance I think Mr. Pirich, in fact Mr. Pirich did acknowledge this in his brief, a public body corporate is not the same thing exactly as a government agency, but in the case of the State Bar of Michigan, we're also dealing I think with a fundamentally different kind of an organization. The Secretary of State doesn't exist to promote interests that would be associated with a political action committee. The State Bar of Michigan however is in part at least a membership organization which is there to serve the interests of its members. The Board of Commissioners has made a decision that the activities of LAWPAC in supporting candidates who are interested in issues of concern to lawyers and are active with respect to those issues, that political action committee is acting in the best interests of lawyers.

JUSTICE YOUNG: Referring to my other question. Where is the State Bar by statute or court rule authorized to allow anybody to solicit funds for a political action committee.

MR. ELLSWORTH: Where there is no express authorization, Justice Young, but the authority of the State Bar comes from the rule that the Supreme Court issued governing the activities of the State Bar and that rule is in turn based on the statute which created the state bar.

JUSTICE YOUNG: Is there express authorization to solicit for LAWPAC there.

MR. ELLSWORTH: No, there is no express authorization.

JUSTICE YOUNG: What's your best shot at explicit authorization for the Bar to solicit for LAWPAC.

MR. ELLSWORTH: I believe it comes from the Supreme Court's charge to the Board of Commissioners that the Board of Commissioners is to determine the policies and standards that the State Bar will follow.

JUSTICE TAYLOR: Well let's say hypothetically that the State Bar wanted to do something illegal. That authorization that they have from the Supreme Court you just referred to wouldn't give them the ability to do that, would it.

MR. ELLSWORTH: Of course not.

JUSTICE WEAVER: Any further questions?

JUSTICE KELLY: Does the State Bar undertake other activities that are not explicitly provided for.

MR. ELLSWORTH: Sure. As I think you all know, the court rule that governs the State Bar, it's not a very specific rule in terms of what the Board of Commissioners and the Bar is to do but it's a very broad rule that gives to the Board of Commissioners the basic control over the Bar. Now obviously that control is subject to the supervision of this Court but I would suggest to you that it should not be the business of this Court to immerse itself in the minutia of Bar governments. Thank you very much.

JUSTICE WEAVER: Any other questions? Thank you Mr. Ellsworth. Mr. John Pirich.

MR. PIRICH: Chief Justice Weaver, Justices of the Supreme Court, John Pirich appearing on behalf of the State Chamber. I am also honored and pleased to be in Marquette and argue in this famous courthouse with the Court today. It's a distinct honor, a professional honor and personal honor. I'd just like to respond if I could to a few of the points that Mr. Ellsworth and Mr. Butzbaugh made. I think my last letter, my May 8, 2000 letter which I think includes everything that I put everything that put in my four other letters to the Court going back to February 1999 is self-explanatory. I hope this Court doesn't do this as this Court being asked to get into the minutia of what the State Bar does. This is much more important than minutia. Why candidly–look at the history of what happened here. The Board of Commissioners for 20 years authorized the State Bar to be in operation of a separate segregated fund which was absolutely illegal. It had no authority to do so. And the State Bar entered into a conciliation agreement with Secretary of State saying they weren't going to do that anymore. Now what are we doing with the way this proposal that the dues committee has come up with. The reality is we're trying to do the same thing again. We're saying first of all if you're affiliated with the State Bar you can be on at no cost whatsoever as long as you add that cost in on your own. And I think this Court knows full well from the record that we produced before that unless it's a reverse checkoff the State Bar in its efforts to assist LAWPAC would be absolutely unsuccessful. The reality is 98% of LAWPAC's contributions come through the reverse checkoff, and I would suggest to you, and I don't have empirical evidence of this, but a substantial portion of that is due to inattentiveness or lack of understanding of how this system works. The reality is, unless you go down, and I showed this to the Court previously, and take that amount out of the predetermined bar dues that you are asked to pay, you're charged. So to say that this is the minutia of the Court, I mean we're talking about First Amendment rights of lawyers in this state who don't want to or don't have to participate, why should they have to go through these steps.

JUSTICE TAYLOR: Mr. Pirich, is your argument that this is an illegal act based on the notion that it is effectively a contribution by the State Bar to LAWPAC.

MR. PIRICH: Absolutely, Justice Taylor.

JUSTICE TAYLOR: What if hypothetically the LAWPAC people said to the State Bar we will entirely take over all costs of mailing and send out your dues notice courtesy of us so that indeed the State Bar, in my hypothetical, has no costs. Would it still be illegal.

MR. PIRICH: Absolutely.

JUSTICE TAYLOR: And why would it be.

MR. PIRICH: Section 57–

JUSTICE YOUNG: There's no contribution there.

MR. PIRICH: Well, but it's just any cost, Justice Young.

JUSTICE TAYLOR: Well let's assume a hypothetical where there is none.

MR. PIRICH: Well if there is no cost then I would say it wouldn't be but the reality is–

JUSTICE TAYLOR: Well, I just know you don't have too much time and you want to get that in but let me just ask you, if you had a circumstance where the LAWPAC did in fact say that, a cost-free transaction for the Bar, would your objection then be abated.

MR. PIRICH: It would be abated but the reality is, under Section 4 of the Campaign Finance Act that defines contribution, if there is a transfer of anything of ascertainable value, there is an ascertainable value being on the State Bar dues form that comes out. There is absolutely a value.

JUSTICE TAYLOR: So in my hypothetical even you would still say there is something of value.

MR. PIRICH: Absolutely in the sense that you have the entre then to 33,000 people.

JUSTICE TAYLOR: It's the access which is the value.

MR. PIRICH: Access, absolutely.

JUSTICE YOUNG: Well suppose they were selling a list of members.

MR. PIRICH: Selling the list of members falls outside that gambit because it's for only a service of getting the listing itself. All activities with regard to mailing,

with returning checks from P.C.'s that would come in that are not acceptable, all of that would be handled outside of the ambit of the Bar.

JUSTICE YOUNG: Let me simply suggest to you you're quibbling then now not about whether it's possible that a program could pass muster without causing a contribution or an expenditure, you're just challenging that this one doesn't do it.

MR. PIRICH: This one doesn't do it, number one. Number two, it's been two years that we have been going through this process, or three. July 1st the bar dues go out again and we have the same cycle repeating itself.

JUSTICE YOUNG: Let me just make sure I'm clear on your position. If it were provable that the entire value of this transaction was being underwritten, including the value of having this reverse checkoff, that LAWPAC was paying the bar for all of that so there was no charge, no expenditure, no compensation running from the bar anywhere else, then you have no argument.

MR. PIRICH: Well you have the argument though that if there is any ascertainable value it's still value.

JUSTICE YOUNG: Well let's assume that you can ascertain the value of the reverse checkoff and that's being compensated.

MR. PIRICH: And that's the other problem. The reality is, if I could Justice, the reality is it's not that easy a line under the Campaign Finance Act to make that kind of distinction. The real answer is, the easy answer is, if the people in the Bar Association want the political action committee, go out and do it on their own.

JUSTICE YOUNG: That's a different issue. You're asserting illegality. I'm trying to determine what the illegality is.

JUSTICE TAYLOR: Aren't you saying, Mr. Pirich, in essence that establishing the value is tough because there are intangibles for what it's worth to be on this but that is a feasibility kind of problem, not an illegality problem.

MR. PIRICH: Well to the extent that it could ever be ascertained I think it still is an illegality problem but the reality is I know of no way that you can ascertain it because this is a public body. This is not a non-public body and once you are a public body under Section 57, and I think it's important to review what it says briefly, that you shall not use or authorize use of funds, personnel, office space, property, stationary,

postage, vehicles, equipment or other public resources to make a contribution. I think our position has been straightforward and consistent on this.

JUSTICE TAYLOR: Can I ask you this. Are you also relying on an argument that it's just plain unseemly for a state agency to be soliciting for a PAC.

MR. PIRICH: Absolutely. The hypotheticals that we tried to use, and Mr. Ellsworth said well it won't work with a school board, but the reality is, if this Court authorizes this practice to continue, now all of sudden a school board can come back and say if it's good enough for the State Bar that the Supreme Court has sanctioned it and Section 57 doesn't apply to them, then it doesn't apply to us. It's the same argument that we've used on our list of horribles that once you open the door how do you stop it. Secretary of State can send out drivers license forms and say may be running for political office, here's a PAC and if you want to contribute you can do it.

JUSTICE TAYLOR: Well wouldn't you be making the argument that even if it isn't illegal, let's suppose the cost could be isolated, that it is still inappropriate because it's a state agency.

MR. PIRICH: Absolutely. I used the argument once before this Court that the Natural Resources Commission could be soliciting for the National Rifle Association. It's absolutely inappropriate. It's absolutely unseemly to have that kind of activity with regard to a public body and Mr. Ellsworth has admitted previously in his writings and his argument that the State Bar is a public body. Understanding that, I think our position is straightforward and clear on that and I think all of the materials that we've submitted to the Court have justified the request that we've asked for, either an administrative ruling or determination from this Court that continuation of the practice isn't acceptable. In terms of the administrative rule that Mr. Ellsworth made reference to, the administrative rule can't trump the statute. I mean that's basically where we are. Section 57 and Section 4 either mean something, and they mean something for the State Bar and the Secretary of State and the Natural Resources Commission, or they don't mean anything. Or they mean something for school boards or they don't mean something for school boards. We think it's straightforward and clear.

JUSTICE WEAVER: Thank you Mr. Pirich. Any other questions?

MR. PIRICH: Thank you very much.

JUSTICE WEAVER: That concludes our hearing this morning and this afternoon. Again for all the Court, we express our appreciation and particular pleasure it

has been to be here in this beautiful courtroom in this very fine part of Michigan. And it is my understanding that the local bar has arranged to have lawyers, members of the Bar and the Bench for a reception for the bar members to meet with the Justices. With that we will be adjourned. Thank you.